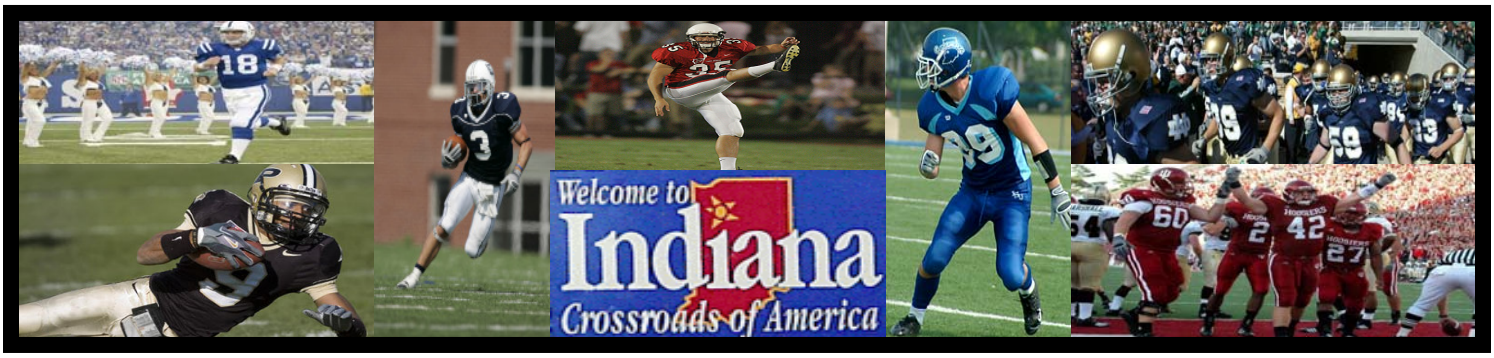
The Indiana Prosecutor

September 2006



An Evening with Don Lundberg

The IPAC Ethics Committee was fortunate enough to meet with Donald Lundberg, Executive Secretary of the Supreme Court Disciplinary Commission, for a casual discussion. Mr. Lundberg indicated that there were two areas that prosecutors should be aware that might make them an object of review for his office.

Mr. Lundberg expressed concern that Rule of Professional Conduct 3.6 (d) (6), Trial Publicity, is an area that frequently draws the attention of his office.

"(d) A statement referred to in paragraph (a) will be reputably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to that proceeding and the statement is related to:
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the *defendant is presumed innocent until and unless proven guilty*."

He cautioned that prosecutors must make a concerted effort to include the reference to defendant's presumption of innocence when addressing the media. Since the media tends to be interested in more meaty comments and may not print or repeat the disclaimer, Mr. Lundberg suggested going further to protect your record. When issuing a press release make sure to include the disclaimer language. During oral press conferences it would be worth your while to run your own separate tape recorder to show that you did indeed mention that the defendant was presumed innocent until proven guilty. That way you do not have to rely only on the aired portion of a press conference to show that you did follow 3.6.

In addition to comments made directly to the media, prosecutors also must be concerned with informing law enforcement of the conditions imposed by 3.6. Mr. Lundberg indicated that he understood prosecutors did not directly control law enforcement officers. His office is more concerned that prosecutors take an active step informing law enforcement. His comment was that prosecutors needed to start making a paper trail on the issue. The IPAC Ethics Committee has suggested that prosecutors inform the law enforcement divisions in their counties yearly in writing of the tenets of 3.6.

The other area of concern for the Disciplinary Commission involved Brady Violations. The US Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the

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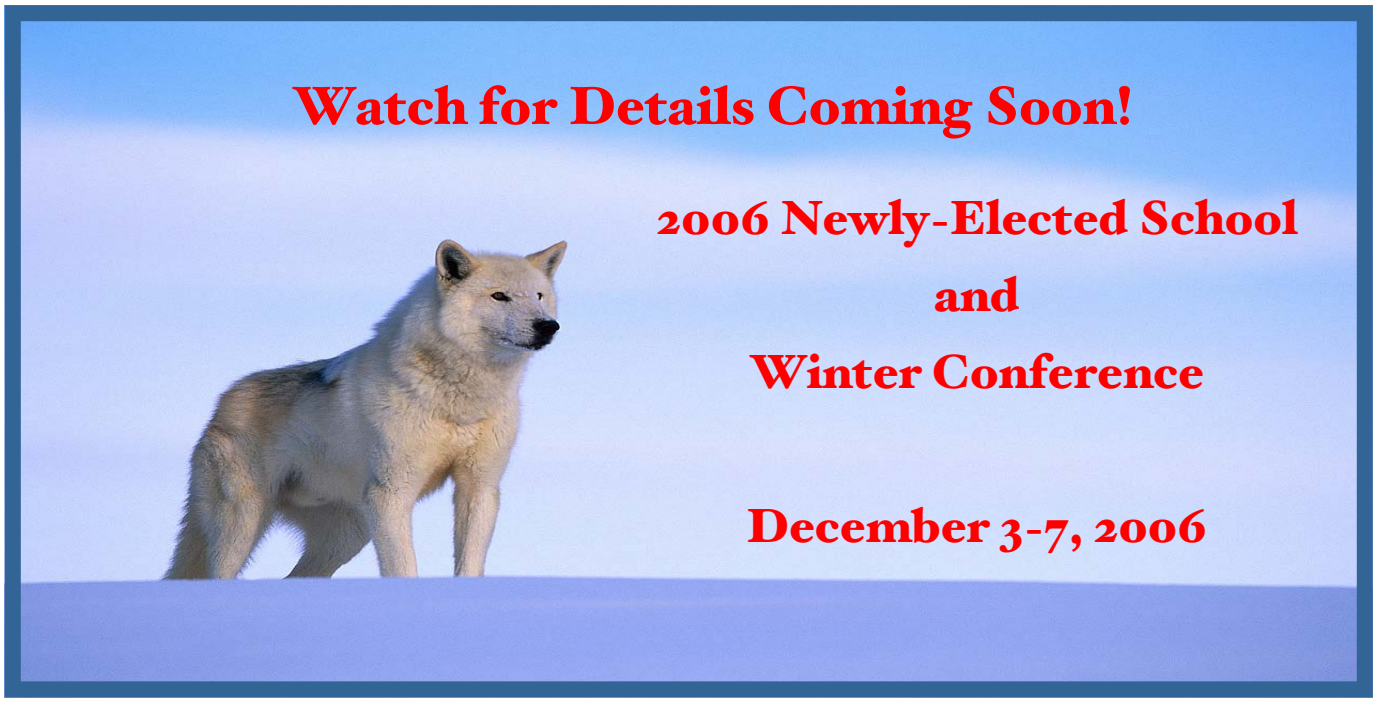
good faith or bad faith of the prosecution." Under Rule of Professional Conduct 3.8 (d), a prosecutor should "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." Disputes over discovery of potentially exculpatory evidence are accusations the commission will review closely. To avoid conflicts prosecutors should meet with law enforcement officers early in the case to make sure that all discoverable evidence is turned over in a timely manner to defense counsel.

One last point made by Mr. Lundberg is that attorneys should feel comfortable to call his office to inquire or discuss a complaint. He made the point that he is not a judicial officer so any discussions do not constitute ex parte communications.



Recent Decisions—Sentencing Issues

Defendants can appeal sentences entered under guilty plea agreements when the court is given some discretion in sentencing.

This summer the Indiana Supreme Court provided guidance on when a defendant can appeal a sentence which resulted from a guilty plea. The leading case is ***Childress v. State/Carroll v. State*, 848 N.E.2d 1073**.

Indiana Rule of Appellate Procedure 7(b) grants appellate courts the authority to review sentences which are "inappropriate in light of the nature of the offense and the character of the offender." Under Supreme Court interpretation, this rule is not limited to trial decisions but applies to guilty pleas as well. The Court specifically disavowed the multiple Appellate Court decisions which held defendants waived the ability to appeal under rule 7(b) when they agreed to plead guilty. Specifically those cases found that once a defendant entered into a guilty plea he acquiesced in the sentence; therefore, the sentence could be considered appropriate. The Supreme Court found "to say that a defendant has acquiesced in his or her sentence or has implicitly agreed that the sentence is appropriate undermines in our view the scope of authority set forth in Article VII, section 4 of the Indiana Constitution." The Supreme Court found both Childress' and Carroll's sentences were subject to appellate review.

Childress' plea agreement provided that he would plead guilty to possession of methamphetamine as a Class B felony with the State dismissing the remaining charges. The parties agreed that the defendant would be *sentenced to the Department of Corrections for six years but both sides were free to argue* whether any of the time should be executed. At sentencing the defendant received six years executed. The Court of Appeals found this sentence was appropriate in light of the nature of the offense and the character of the offender. This finding was affirmed by the Supreme Court.

Carroll was charged with multiple drug and weapon offenses. His plea agreement provided that he plead to dealing in methamphetamine as a Class B felony, carrying a handgun without a license as a C felony and resisting law enforcement as a D felony. The agreement contained the language "*both sides are free to argue the defendant's sentence with the maximum possible sentence being twelve (12) years executed*." Carroll received a sentence of eleven and one-half years executed. The Court found, based on defendant's character and the nature of the offense, that Carroll's sentence was appropriate and affirmed the trial judge.

In a concurring opinion Justice Dickson noted that their decision to review does not mean that the defendant's decision to take a plea should be completely without weight. He opined that defendant's consent to a plea should indicate some amount of appropriateness but not automatically exclude the sentence from further consideration. Justice Dickson wrote that relief from sentencing should only be granted in the "most rare, exceptional cases."

***Hole v. State* 851N.E.2d 302 (Ind. 2006)**

The defendant agreed orally to plead to a *ten year sentence with placement open to the court*. He was subsequently sentenced to serve an executed sentence at the Department of Corrections. He appealed his sentence under Indiana Appellate Rule 7(b). The Supreme Court found that the only sentences resulting from a guilty plea that could be raised on direct appeal were those where the trial court exercised discretion in sentencing. Therefore where a guilty plea calls for a cap on executed time or where he pleads to an open agreement, the defendant may contest his sentence on the grounds the sentence is inappropriate in light of the nature of the offense. However, here the court found that the defendant agreed to plead to ten years. The court had no discretion to impose anything other than the ten years agreed to by the parties. Therefore Hole cannot seek relief under Rule 7(b).

Contrast *Hole* to ***Rivera v. State* 851 N.E.2d 299 (Ind. 2006)**. Rivera, like Hole entered into a ten year plea agreement. The terms of Rivera's agreement were that he would receive a *ten year sentence at the Department of Corrections with the parties arguing as to how said sentence shall be served.* At sentencing Rivera received ten years with four years suspended. The Supreme Court found this case was appropriate for appellate review of the sentence. They found Rivera's plea agreement gave the trial court a certain amount of discretion in imposing sentence. Even though the trial court was bound to impose a ten year sentence, it retained the ability to determine the amount of time to be suspended and served on probation. Therefore Rivera was free to appeal his sentence under Appellate Rule 7 (b). The Appellate Court had previously determined Rivera's sentence was appropriate and the Supreme Court declined to review their decision.

Indiana Supreme Court Recent Decisions

- Newest decision on Child Hearsay, when is a child witness unavailable for cross-examination

On September 6, 2006, the Indiana Supreme Court decided ***Howard v. State.*** This case involved a child who had been molested by her step-father. At trial the twelve-year-old victim, C.C., became distraught after answering only a few preliminary questions on direct. Continuously crying, C.C. became unable to continue her testimony. The court called a recess to allow C.C. time to regain her composure. During the hour break she continually sobbed and vomited. Prior to the jury returning, the court questioned C.C. about her ability to continue. C.C. indicated that she could not. Following arguments from both counsels, the victim was found by the court to be unavailable as a witness and her deposition was submitted in lieu of her testimony.

On appeal, defense counsel asserted that the victim was not unavailable to testify at trial and that he was denied the constitutional right of cross-examination. The Supreme Court observed that the legislature dealt with the issue of unavailability of a child witness by adopting the protected person statute found under IC 35-37-4-6. In an attempt to reduce the trauma on children while still protecting the right of cross examination, the legislature provided a framework for unavailability determinations. Under the statute, a trial court can find a witness to be unavailable based on the testimony of a psychiatrist, physician, or psychologist presented during a Child Hearsay Hearing. The test of availability is whether by testifying in the presence of the defendant the child will suffer serious emotional stress, which will prevent them from testifying.

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When C.C. was unable to continue the trial judge made the determination that she was not available. Contrary to the approved statutory method of determining unavailability, the trial court's unavailability ruling was based on his own observations, questioning of the victim, and arguments of counsel rather than on testimony of a psychologist or other qualified professional. The Supreme Court concluded, "because C.C. was present at trial and took the stand but refused to testify, we conclude that in the absence of an unavailability finding pursuant to the protected person statute, C.C. was not 'unavailable.'" Howard's conviction was reversed by the court and remanded for a new trial.

The Court then reviewed defense's second contention, whether submitting C.C.'s deposition in lieu of her testimony satisfied defendant's Sixth Amendment right to cross examination. Under the United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004) a hearsay statement submitted in lieu of a witness's testimony violates the 6th amendment when the out of court statement is testimonial in nature and the defendant lacked the prior opportunity to cross examine the witness. Our court found the deposition was certainly testimonial in nature. The question became did the defendant have an opportunity to cross examine the witness?

As noted by the Court, Crawford does not specify the standard for determining what amount of "opportunity" is required before the Sixth Amendment is satisfied. Defense argued that the deposition was taken for purposes of discovery and not for purposes of preserving testimony for trial. Therefore he had not had the opportunity to cross examine C.C. The Court noted that defense counsel conducted a "vigorous and lengthy" examination of the victim which lasted for two hours and resulted in ninety-two pages of transcription. Because the defense was given a fair opportunity to probe the victim's testimony, the court found that defendant's right to cross examination had been protected. The case was remanded back to the trial court with the admonishment that with a proper protected child unavailability finding, the deposition could be properly admitted in lieu of testimony.

On a first read of the Howard decision, one is drawn to the overwhelming horror of the inequity of having a child so distraught being forced to trial once again. During the course of appeal C.C. turned fifteen and is no longer eligible to be found unavailable under the protected person statute. The second question is how can this be handled at trial when a child unexpectedly becomes so distraught that they are unable to answer questions. At this time the answer has to be to ask for a

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Indiana Supreme Court Recent Decisions

recess of the trial to have the child evaluated by a qualified professional. Having practiced trial law and been confronted by a judge who under similar circumstances pulled me aside and said "make her talk", I realize the likelihood of getting a continuance in the middle of a jury trial sufficient in length to get this type of evaluation is slim and none in some jurisdictions. However, under this decision the prosecution is left with no other choice. Of course if the child prior to trial gives indicators that she/he may not be able to get through a trial, a preemptory evaluation for purposes of an unavailability determination under the protected person statute would be a recommended approach.

Recent OWI Decisions

Jarrell v. State, 852 N.E.2d 1022 (Ind. Ct. App., 2006).

James Jarrell was found guilty of Operating with a BAC of .15 or more after a bench trial. The State introduced into evidence a certificate from the Department of Toxicology stating the DataMaster machine used had been inspected and certified and was in good working condition. Jarrell objected on the grounds that the certificate was hearsay under *Crawford* and the recent decision of *Hammon* and *Davis*. The trial court admitted the certificate over Jarrell's objection.

The Court of Appeals upheld the objection, stating "it appears to us that *Davis/Hammon* is of little or no assistance in deciding the case before us. Those cases were highly fact-specific and generated a rule related to a precise, but frequently recurring scenario: that of 911 calls or statements made by alleged victims to police who are 'first arrivers' in response to a 911 call. The DataMaster certificate in this case was not generated within the context of an ongoing emergency or recently ended emergency and it was not generated in response to 'police interrogation.'"

The Court went on to reiterate the holdings of *Napier* and *Rembusch* and found that the certification of breath test machines bears no similarity to the type of evidence the Supreme Court labeled as testimonial. "We do acknowledge that breath test machine certifications might be said to have been prepared 'in anticipation of litigation' in one sense, in that it is clear that such certificates may be used in future drunk driving prosecutions...However, certification of breath test machines is removed from the direct investigation or direct proof of whether any particular defendant has operated a vehicle while intoxicated; the certificates are not prepared in anticipation of litigation in any particular case or with respect to implicating any specific defendant."

McCray v. State, 850 N.E.2d 998 (Ind. Ct. App., July 20, 2006).

On April 28, 2005 at 10:13pm, IPD Officer Vanek received a call that Amy McCray, driving a red Beretta, had intentionally struck a car and was on her way to 1202 South Worchester. Officer Vanek arrived at 1202 South Worchester, and when no one answered the door, he called the telephone number. McCray opened the door and Officer Vanek noticed that she was extremely intoxicated.

McCray admitted to drinking four beers prior to driving to pick up her two children and driving to her boyfriend's house. McCray told Officer Vanek that she did not intentionally strike her boyfriend's vehicle, but she admitted to driving home with her children in the car. Officer Vanek went to the garage and found the red Beretta with two children still in the back seat. Neither child was in a safety seat. After a bench trial, McCray was found guilty of Operating While Intoxicated, a Class A misdemeanor as a lesser included offense.

McCray appealed the verdict, arguing that there was insufficient evidence to support her conviction. Specifically, McCray alleges that the State failed to prove beyond a reasonable doubt the temporal element of the crime: that she was actually intoxicated at the time she operated her vehicle.

The Court upheld the trial court's verdict, finding there was "a reasonably defined period of time in which the drinking, intoxication, and driving occurred." The Court found that the evidence established that McCray had been drinking at a bar before driving her vehicle to pick up her children, and that she then drove to her residence. Officer Vanek arrived at the scene, discovered McCray intoxicated, and located the children and the vehicle in the span of 20 minutes after receiving the call from dispatch. The Court held, "since there was limited time between receiving the call that a red Beretta was heading to the residence, and actually locating McCray in an intoxicated state, a fact finder could reasonably conclude that McCray drove while intoxicated."

Recent OWI Cases

State v. Augustine, 851 N.E.2d 1022 (Ind. Ct. App. August 1, 2006).

On July 16, 2004 a man called police on his cell phone to report another man's erratic driving. The caller gave the license plate number of the vehicle. The officer responding to the call was unable to locate the vehicle, but with the license plate number, obtained an address and proceeded to Augustine's home. When the officer arrived, Augustine was in the driver's seat, in the driveway, with the engine running. When the officer approached the vehicle, Augustine rolled down his window to speak with the officer. The officer noticed a strong odor of alcoholic beverage on Augustine. The officer then had Augustine perform field sobriety tests.

Augustine filed a motion to suppress, and the trial court granted that motion. The State appealed and the Court of Appeals reversed the trial court's decision. The Court held that when the officer approached the vehicle and Augustine rolled down his window, the stop was just a consensual encounter that did not implicate Fourth Amendment concerns. However, when the officer asked Augustine to exit the vehicle, the consensual encounter became an investigatory stop requiring reasonable suspicion.

The Court reasoned that the man who called to make the report was a concerned citizen. The caller identified himself as Jeffrey Rucklos and gave the license plate number of the vehicle. There was no evidence to suggest that Mr. Rucklos concocted a false report or acted in a manner that would have placed his credibility at issue. Mr. Rucklos' specific information regarding the location and license plate number along with the officer's corroboration of Augustine's intoxication during the consensual encounter amounted to reasonable suspicion.

State v. Williamson, 2006 Ind. App. LEXIS 1603 (August 21, 2006).

Excise Officer Charles Butler was driving an unmarked vehicle when he heard a dispatch concerning a suspected impaired driver. Officer Butler was in the area and located the vehicle. The suspected vehicle made a wide right turn and crossed the center line, traveling at a low rate of speed. Officer Butler contacted dispatch and continued to follow the vehicle as it pulled into the parking lot of an apartment complex. The defendant had exited her vehicle and was having trouble standing.

Officer Butler observed the defendant stumble at least twice, grabbing her vehicle for support. Officer Butler then approached the defendant and identified himself verbally and by badge as a law enforcement officer. The defendant responded, "I'm home! I'm on home base!" Officer Butler explained to the defendant that he observed her driving erratically and was assisting in the investigation. Officer Butler continued to speak with the defendant. At one point, the defendant attempted to enter her apartment, but could not find a key. Officer Butler later testified that had she attempted to enter the apartment he would have prevented her from doing so.

Five to ten minutes after Officer Butler approached the defendant, Sergeant Weinzapfel of the Warrick County Sheriff's Department arrived and observed the defendant sitting on the stoop in front of the apartment and Office Butler standing by his vehicle. Sgt. Weinzapfel conducted an investigation and arrested the defendant for Operating While Intoxicated, a Class A misdemeanor. The defendant filed a motion to suppress, which the trial court granted. The State appealed.

The Court of Appeals reversed the trial court's decision and held that Officer Butler did not "detain" the defendant; he did not take her keys or exhibit any behavior that indicated he would interrupt her freedom or restrict her liberty. "A citizen's knowledge that the person asking her questions is a police officer is not enough, by itself, to cause the citizen to believe that she is being detained or arrested. Furthermore, a police officer's unarticulated intent is not sufficient to establish that an arrest or detention has occurred. An officer's intent is relevant only if conveyed through words or actions to the individual being questioned. The test is how a reasonable person in the defendant's circumstances would understand the situation."